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No. 07-1209

IN THE
Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS,
Petitioner,
v.

WOODROW F. SANDERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT PATRICIA SIMMONS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that when the Department of Veterans Affairs (VA) fails to provide statutorily required notice to benefits claimants, the VA should bear the burden of showing that such an error was not prejudicial.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF RESPONDENT PATRICIA SIMMONS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-64a) is reported at 487 F.3d 892. The order denying the petition for rehearing and rehearing en banc (Pet. App. at 65a-66a) is unreported. The decision of the United States Court of Appeals for Veterans Claims (*id.* at 67a-82a) is unreported. The decision of the Board of Veterans' Appeals (*id.* at 83a-96a) is unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Veterans Claims Assistance Act of 2000 provides in relevant part:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

2. The Veterans' Judicial Review Act provides that the United States Court of Appeals for Veterans Claims shall "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

STATEMENT

A. Statutory Background

1. Veterans who suffer a physical or mental disability resulting from their active military service are generally entitled to disability benefits. *See* 38 U.S.C. §§ 1110, 1131. Such benefits are available to veterans who served during war and peace, and to those who served on the battlefield and off. *See id.* §§ 1110, 1131.

In order to apply for disability compensation, a veteran must file a claim for that benefit with the Department of Veterans Affairs (VA). *See id.* § 5101(a).

The VA claims system is structured to be "unlike any other adjudicative process," in that "[i]t is specifically designed to be claimant friendly." H.R. Rep. No. 105-52, at 2 (1997). Congress has implemented a comprehensive pro-claimant scheme by, among other things, requiring the VA to assist the veteran in proving his claim. Detailed statutory notice requirements enacted in the Veterans Claims Assistance Act of 2000 (VCAA) are one of the first steps in the process and are a central part of this assistance-based framework. The "core requirement," *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1335 n.3 (Fed. Cir. 2006), of these notice provisions is that "[u]pon receipt of a complete or substantially complete application," the Secretary is required to notify the claimant "of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. § 5103(a). This notice requirement has been called the "first-element" notice. *See Mayfield* v. *Nicholson*, 19 Vet. App. 103, 123 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006).

The VCAA also requires other forms of notice: the Secretary must inform the claimant of which portion of the necessary information should be provided by the claimant, and which portion the Secretary will attempt to obtain on the claimant's behalf. 38 U.S.C. § 5103(a). These forms of notice are termed, respectively, second- and third-element notice. *See Mayfield*, 19 Vet. App. at 122; *see also* Pet. App. 9a. If an application for benefits is incomplete, the Secretary must also notify the claimant of the information necessary to complete the application. *See* 38 U.S.C. § 5102(b).

Congress has imposed a variety of additional obligations on the VA aimed at assisting the veteran in substantiating his claim. For instance, the VA is required to assist claimants by making "reasonable efforts" to obtain evidence to substantiate the veteran's claim, *see* 38 U.S.C. § 5103A(a)(1), such as by obtaining relevant records on behalf of the claimant. *Id.* § 5103A(b)(1); *see also id.* § 5103A(c). The statute also sets up various presumptions to favor veterans, making it easier for them to obtain benefits. *See*, *e.g.*, *id.* §§ 1111 (presumption of sound condition), 1112 (listing service-connection presumptions). And the statute breaks a tie "regarding any issue material to the determination of a matter" in favor of the veteran: the VA must "give the benefit of the doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." *Id.* § 5107(b).

A veteran's claim for benefits is initially adjudicated by one of the VA's regional offices. *See Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1318 (Fed. Cir. 2005). If a veteran's claim for benefits is denied by the regional office, he may appeal the decision within the agency to the Board of Veterans' Appeals (Board). *See* 38 U.S.C. § 7104(a).

2. Congress also created a special system for the review of the agency's benefits decisions. Review of such decisions is not governed by the Administrative Procedure Act (APA); rather, Congress vested jurisdiction over these appeals in the United States Court of Appeals for Veterans Claims (Veterans Court), "an Article I court set in a sui generis adjudicative scheme for awarding benefit entitlements to a special class of citizens." *Bailey* v. *West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring). Only the veteran, and not the VA, may seek review in the Veterans

Court. 38 U.S.C. § 7252(a). Factual findings of the Board that are favorable to the veteran are not subject to review. *See id.* § 7261(a)(4). On review, the court must "take due account" of the fact that the VA was required to give the "benefit of the doubt" to the veteran, breaking ties in the veteran's favor. *Id.* § 7261(b)(1); *see also id.* § 5107(b). The Veterans Court is also required to "take due account of the rule of prejudicial error," *id.* § 7261(b)(2), though the statute does not specify whether the VA or the veteran has the burden to prove or disprove prejudice when the agency errs.

Decisions of the Veterans Court can be appealed to the Federal Circuit, which has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" by the Veterans Court. 38 U.S.C. § 7292(c). The Federal Circuit generally does not have jurisdiction to review factual findings. *See id.* § 7292(d)(2).

3. In 2005, the Veterans Court addressed the Veterans' Judicial Review Act (VJRA) prejudicial error provision, Section 7261(b)(2), in the context of the notice requirements of the VCAA. *Mayfield*, 19 Vet. App. 103. The court held that when the VA commits a first-element notice error by failing to notify the claimant of the information and evidence necessary to substantiate the claim, the VA bears the burden of demonstrating that there was no prejudice to the claimant from that error, given that such an error has "the natural effect of producing prejudice." *Id.* at 122. The *Mayfield* court explained that the first-element notice error alleged in that case "would constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the claimant] from participating effectively in the processing of [the] claim, which

would substantially defeat the very purpose of section 5103(a) notice." *Id.* The court held that when the VA fails to comply with the additional statutory notice requirements, however, the claimant has the burden of showing that those errors prejudiced the proceeding by affecting its essential fairness. *Id.* at 122-123.

B. Factual And Procedural History

1. Respondent Patricia Simmons[1] served on active duty in the United States Navy from 1978 to 1980. Pet. App. 68a. While in the Navy, Simmons worked on a flight line near aircraft engines, which meant that she was constantly subject to a noisy work environment. *Id.* at 68a, 88a, 90a.

In 1980, Simmons filed with a VA regional office an application for disability benefits for hearing loss in her left ear. Pet. App. 68a. The regional office concluded that she had a current disability, and that the disability was "service connected" because the increase in her hearing loss was caused by her military service. *Id.* at 68a, 86a. The regional office, however, denied her claim for benefits on the basis that the disability was not severe enough to be compensable. *Id.* at 68a, 86a. The Board affirmed. *Id.* at 68a-69a.

In March 1998, Simmons requested that the regional office amend her claim. Pet. App. 69a; *see also id.* at 57a, 86a. Simmons claimed that her left-ear hearing loss had gotten worse, and that her worsening left-ear disability had caused right-ear hearing loss as well.

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[1] Respondent has married and is now known as Patricia White. In order to avoid confusion, she is referred to in this brief as Patricia Simmons.

Id. at 69a. The regional office denied her claim (*id.* at 57a, 69a), but the Board remanded: among other things, the Board instructed the VA regional office to comply with the duty-to-notify and duty-to-assist provisions of the newly-enacted VCAA. *Id.* at 69a, 89a.

In March 2001, the regional office sent a letter to Simmons purporting to provide the notice required by the VCAA. Pet. App. 69a; JA 41-47. At that time, Simmons was trying to establish (1) that her right-ear hearing loss was connected to her military service, by showing that it was caused by her left-ear hearing loss (so that it would qualify for so-called "secondary service connection"[2]) and (2) an increased disability rating for her left-ear hearing loss. Pet. App. 69a, 78a-79a. The letter, however, did not inform Simmons of the evidence and information needed to support either claim. *See* JA 43-44. The regional office again denied her claims, and the Board affirmed. Pet. App. 70a-71a, 84a-85a, 96a; JA 30-40.

Simmons appealed to the Veterans Court, arguing, among other things, that the VA had failed to comply with the notice requirements of the VCAA. Pet. App. 71a-72a. The Veterans Court agreed, finding that the VA had failed to comply with the VCAA's notice requirements, including first-element notice (i.e., notice of the information necessary to substantiate her claim). *Id.* at 78a-79a, 81a. Specifically, the court found that "[a]lthough [the] letter clearly pertained to [Simmons's]

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[2] A "disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition." 38 C.F.R. § 3.310(a).

increased-rating claim, [it] failed to inform her (1) that an increase in severity of her service-connected condition was required and (2) what types of evidence or information were needed, or could be submitted to establish that claim." *Id.* at 78a-79a. Citing *Mayfield*, the court noted that Veterans Court precedent placed the burden on the VA of proving that the first-element notice error did not prejudice Simmons. *Id.* at 80a.

The VA appealed to the Federal Circuit. Pet. App. 56a. It argued that, even assuming the VA had failed to provide the requisite notice (a factual finding not reviewable by the Federal Circuit, 38 U.S.C. § 7292(d)(2)), the veteran should have been required to prove that the VA's error caused her prejudice.

2. On the same day that the Federal Circuit decided *Simmons*, the court decided *Sanders* v. *Nicholson*, 487 F.3d 881 (Fed. Cir. 2007), the companion case before this Court. *See* Pet. App. 1a, 56a. In *Sanders*, the Federal Circuit confronted the question that the Veterans Court considered in *Mayfield*, i.e., which party bears the burden of proving (or disproving) harmlessness when the VA fails to give the notice required by the VCAA. *See id.* at 1a. The Federal Circuit went farther than *Mayfield*: while *Mayfield* had applied the burden to the VA for first-element errors only (i.e., failures to inform the veteran of the "information … that is necessary to substantiate the claim"), *Sanders* held that, "in light of the uniquely pro-claimant benefit system created by the VCAA" (*id.* at 20a), all VCAA notice errors should be presumed prejudicial, not just first-element notice errors, placing the burden on the VA to disprove prejudice. *Id.* at 14a. "Put simply," the court explained, "interpreting [the rule of prejudicial error] as requiring veterans to overcome a series of complex legal hurdles in order to secure the

assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

In *Simmons*, which involved a first-element notice error, the Federal Circuit relied on its decision in *Sanders*: it held that "the Veterans Court properly placed the burden on the Secretary to establish that an error in a notice the [VA] was required to give Ms. Simmons was not prejudicial." Pet. App. 56a.

SUMMARY OF ARGUMENT

Veterans who suffer from physical or mental disabilities resulting from their military service are generally entitled to disability benefits. In the VCAA, Congress provided that when a veteran applies for such disability benefits, the VA must notify the veteran of the "information … that is necessary to substantiate the claim." The VA, however, failed to comply with the statutory provision in this case. The question now is not whether the VA erred, but, in light of the error, should the veteran or the VA have the burden of proving whether the VA's error prejudiced the veteran.

When deciding how to assign a burden of proof within a specific statutory framework, this Court starts with the statute. In this case, although the statutory language is ambiguous, the general statutory context is instructive. Congress has established an integrated framework for veterans benefits claims that consistently imposes obligations on the VA to assist the veteran in seeking and obtaining benefits. Congress's general pattern of allocating additional duties to the VA plainly informs the allocation-of-burden question at issue in this case. *See infra* Part I.A.

With regard to VCAA notice errors in particular, the statutory structure makes clear that the burden of

proving or disproving prejudice must rest on the VA, and not the veteran. This is so not simply because of Congress's general approach of placing duties on the VA to assist the veteran, but because of the central role of VCAA notice in the benefits system. Effective notice—as both an important component of the pro-claimant system and a necessary precursor to many of the other forms of assistance available—is critical to advancing Congress's objectives in this assistance-based benefits scheme. *See infra* Part I.B.

The other factors considered by courts in allocating burdens, including probabilities and practical considerations, also favor placing the burden on the VA. In particular, because of the central role that VCAA notice plays in the benefits system, these errors are likely to prejudice the veteran. And as between the VA and the veteran, the VA is better positioned to bear the burden. *See infra* Part I.C. The Government's policy arguments concerning the effects on the VA, moreover, do not alter this analysis. *See infra* Part I.D.

Rather than engaging on the merits with these considerations, the Government's brief largely sidesteps them. It centers its argument instead on a single syllogism: that, in its view, the similarly worded prejudicial error provision in the APA clearly requires allocating the burden to the party claiming error; that the APA and VJRA prejudicial error rule should be interpreted in the same way; and, therefore, that the supposedly settled meaning of the APA provision should control here. Quite apart from its failure to grapple with the factors addressed above, this approach fails on its own terms.

The Government's principal argument is that Congress ratified a settled interpretation of the APA when

it enacted the VJRA, yet there was no such settled view for Congress to ratify. To support the existence of a settled construction of the APA, the Government merely cites four court of appeals opinions decided before 1988 (only two of which as direct authority); these four cases, with narrow holdings, do not provide a basis for ratification, particularly in light of other court of appeals cases that relieved the party claiming agency error from proving prejudice. *See infra* Part II.A.

The Government's implication that, regardless of ratification, the APA rule of prejudicial error in fact has a specific meaning that should control here fails for similar reasons. In the more than 60 years since the APA was enacted, this Court has never confronted the question of which party bears the burden of proof under the APA provision. As a matter of statutory interpretation, moreover, it is far from clear that the APA should be construed to invariably place the burden on the party claiming error. And given the divergent statutory contexts, there is no reason that even a settled APA rule need be applied to the VJRA. *See infra* Part II.B.

ARGUMENT

I. Statutory Structure And Purpose Make Clear That The Burden Should Be Allocated To The VA

When this Court addresses the question of allocating the burden of proof within a statutory framework, it begins with the statute. *See, e.g.*, *Schaffer* v. *Weast*, 546 U.S. 49, 56 (2005). Where the burden allocation is not made explicit in the statute's text, the Court looks to traditional tools of statutory interpretation, such as the statutory structure and purpose, for guidance. *See Meacham* v. *Knolls Atomic Power Lab.*, 128 S. Ct. 2395, 2401 (2008) ("look[ing] at the text and structure"

to assign burden); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 493-494 (2004) (assigning burden to assure parity across statutory provisions); *see also United States* v. *First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967) (considering legislative history). This statutory analysis is often supplemented with practical considerations of probability as well as policy and fairness. *See Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977); *see also* 2 *McCormick on Evidence* § 337, at 477 (6th ed. 2006). At bottom, however, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation." *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973); *see Alaska Dep't of Envtl. Conservation*, 540 U.S. at 494 n.17 ("No 'single principle or rule … solve[s] all cases and afford[s] a general test for ascertaining the incidence' of proof burdens." (quoting 9 Wigmore, *Evidence* § 2486, at 288 (Chadbourne rev. ed. 1981)).

The VJRA's statutory language offers little indication as to how the burden should be allocated. The statutory context—the markedly pro-veteran benefits system generally and the VCAA in particular—while not directly resolving the issue, reflects repeated determinations by Congress to burden the VA as a means to assist the veteran in obtaining benefits. And more specifically, the role of the VCAA notice requirements in the benefits system demonstrates that, in that context in particular, the burden in the prejudice inquiry must rest on the VA. The notice requirements affect the veteran's ability to obtain benefits and are the linchpin of the various forms of assistance that Congress requires the VA to provide; absent proper notice, the pro-claimant features of the process are impaired,

thwarting Congress's objectives. Notice errors, in turn, are highly likely to prejudice the veteran. That probability, coupled with the VA's ability to meet its burden, confirm that the burden must be allocated to the VA. And the Government's policy arguments do not require a different conclusion.

A. The VJRA's Prejudicial Error Rule Is Part Of A Benefits Scheme That Consistently Imposes Obligations On The VA

1. The starting point of the inquiry, the statutory language, does not resolve the question of the allocation of the burden. Neither the language regarding prejudicial error in the VJRA nor the language of the VCAA's notice provision speaks directly to the allocation of the burden, leaving it an open question. To the extent that the statutory language sheds any light on the matter, it permits the allocation to vary in certain contexts. Congress has directed the Veterans Court to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2). This language—the phrase "due account" in particular—implies that the burden need not uniformly rest on one side or the other across all contexts, and that it could instead be allocated differently depending on the nature of the claim of error. *See* Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 160 (1967) ("The need for flexibility … was met by leaving the courts free to take '*due* account … of the rule of prejudicial error.' 'Due' means 'just and proper,' i.e., reasonable in all the circumstances, as in 'due care.' " (emphasis and alterations in original)).[3]

[3] The Government struggles to give meaning to this "due account" language, and appears to admit the possibility that the lan-

2. The VJRA prejudicial error rule is part of a comprehensive benefits scheme designed by Congress that reflects its persistent imposition of duties on the VA and other efforts to structure the process to assist the veteran in obtaining benefits.

In recognition of the long-held understanding of the special obligation that the country owes to its veterans,[4] Congress has created a benefits system "designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985).[5] The veterans benefits system is "unlike any

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guage may permit the Veterans Court flexibility in applying the rule. Pet. Br. 18.

[4] "The origin of legislation providing relief for soldiers and sailors disabled in the service of their country has been traced to Elizabethan England and a statute providing pensions to veterans who had served since 1588, the year of the Spanish Armada. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers, and shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of American independence." H.R. Rep. No. 100-963, at 9 (1988) (citing *Federal Laws Relating to Veterans of Wars of the United States (Annotated)* 25 (GPO 1932)).

[5] *See, e.g.*, 146 Cong. Rec. H6786, H6789 (daily ed. July 25, 2000) ("We have an obligation to make sure that our veterans are given a hand in receiving the benefits that they have worked for, that they have in some cases bled for, and have certainly earned in the defense of our country." (statement of Rep. Reyes)); *Nolen* v. *Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" (internal quotation marks omitted)); 146 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (Congress has established a "relationship between the [VA] and the claimant [that is] unique in the Federal Government" (statement of Sen. Rockefeller)).

other adjudicative process." H.R. Rep. No. 105-52, at 2 (1997). It eschews the traditional adversarial model of claims adjudication and instead reflects an integrated assistance-based approach.

The assistance offered to the veteran, and the resulting duties placed on the VA, take various forms throughout the process. At the outset, the VCAA notice provisions at issue in this case require the VA to inform the veteran of what is necessary to make out his claim and whether the veteran or the VA is responsible for obtaining the relevant evidence and information. 38 U.S.C. § 5103(a). Once the veteran is aware of the contours of his claim, the VA is required to assist claimants by making "reasonable efforts" to obtain evidence to substantiate a claim, *id.* § 5103A(a)(1), including by helping the veteran obtain relevant records, *id.* § 5103A(b)(1), and, in the case of disability compensation, by "providing a medical examination or obtaining a medical opinion [for the veteran] when such an examination or opinion is necessary to make a decision on the claim," *id.* § 5103A(d)(1).

The statute also includes structural safeguards intended to make it easier for the veteran to prove his claim. It breaks a tie "regarding any issue material to the determination of a matter" in favor of the veteran: the VA must give the "benefit of the doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b). And the judicial review process similarly operates in favor of the veteran: only the veteran and not the VA may seek review in the first place, and factual findings in the veteran's favor are not reviewable. *Id.* §§ 7252(a), 7261(a)(4). Judicial review also perpetuates the statutory requirement favoring the veteran in the case of a tie; the court must "take due account" of the

requirement that the VA give the "benefit of the doubt" to the veteran. *Id.* § 7261(b)(1); *see also id.* § 5107(b).

3. The VCAA, the home of the notice provisions at issue in this case, is a prime example of Congress's approach to veterans benefits claims: When faced with a question whether to impose obligations on the VA or the veteran as part of the claims process, Congress has chosen to burden the VA and, in turn, ease the process for the veteran.

The VCAA was largely a response to the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), *withdrawn*, 14 Vet. App. 174 (2000) (per curiam). *Morton* held that the VA's statutory requirements to assist the veteran did not apply unless the claim was first shown to be "well-grounded." *Id.* at 486. The *Morton* Court purported to "discern[] a Congressional intent to create" a process whereby only claimants "who have met the requisite burden … are entitled to the benefit of VA's obligations to assist," *id.* at 480, and purported to find that this burden on the claimant reflected a "'policy that implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which—as well grounded—require adjudication,'" *id.* (quoting *Grivois* v. *Brown*, 6 Vet. App. 136, 139 (1994)).

Congress promptly rejected such efforts to restrict the VA's obligation to assist all claimants, and not just those whose claims were deemed "well-grounded." When enacting the VCAA, the House Committee explained, "[t]he Committee's intent is to overrule that portion of the decision in *Morton* that found an implied limitation on VA's authority to provide assistance to claimants who had not submitted 'well-grounded'

claims." H.R. Rep. No. 106-781, at 11 (2000). The Act not only rejected efforts to restrict fulfillment of the VA's obligations to assist claimants and made clear that the VA must assist the veteran in pursuing his claims regardless of whether the claim was "well-grounded," but it also supplemented the assistance that the VA was obligated to provide. *See* 146 Cong. Rec. at S9212 ("I believe that this bill restores VA to its pre-*Morton* duty to assist, as well as enhances VA's obligation to notify claimants of what is necessary to establish a claim and what evidence VA has not been able to obtain before it makes its decision on the claim." (statement of Sen. Rockefeller)).[6]

* * *

Thus, although statutory context does not directly answer the question of burden allocation under the prejudicial error rule, it does inform the burden inquiry,[7] which asks whether Congress would impose a burden on the VA or the veteran to meet a requirement in the claims process.

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[6] *See also* 146 Cong. Rec. H9912, H9914 (daily ed. Oct. 17, 2000) (describing the bill as "enhanc[ing] the notice that the Secretary is now required to provide to a claimant"); *see also Quartuccio* v. *Principi*, 16 Vet. App. 183, 186-187 (2002) ("The intent of Congress, as the plain language of the VCAA indicates, was to expand the duties of the Secretary to notify the claimant, not to restrict them.").

[7] Respondent's argument does not rest on the idea that the VCAA should be read to impliedly repeal the VJRA prejudicial error rule, nor on the view that the VCAA should displace the VJRA. *See* Pet. Br. 19-20. Rather, the VJRA itself manifestly leaves open the question of burden allocation, and the benefits system and VCAA offer a basis to assign the burden to the VA for notice errors.

B. The Central Role Of VCAA Notice In The Statutory Structure Governing Benefits Claims Demonstrates That The Burden Must Rest On The VA, Not The Veteran

The notice required by the VCAA is critical to the overall benefits system; it is not only an important part of the assistance provided to the veteran in its own right, but much of the other required assistance hinges on compliance with the notice provisions. VCAA notice's integral role in the system requires that, where the veteran shows that the VA has failed to provide notice, the burden as to prejudice must rest with the VA, not the veteran. This conclusion, reinforced by the statutory context in which Congress has repeatedly sought to assist the veteran by burdening the VA, is necessary because otherwise the prejudicial error rule would frustrate the purpose not merely of the notice requirements, but of the broader goals of the benefits scheme.

The notice provisions are not simply an important component of the benefits system; they play a formative role. The timing of the notice is significant—at the very start of the adjudicative process, before the regional office makes an initial decision on the veteran's claim. *See* 38 U.S.C. § 5103(a).[8] As a result, notice "en-

[8] The pre-VCAA notice requirement provided only that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. § 5103 (1999). The Federal Circuit had interpreted this notice provision as limited in scope, requiring the VA to provide notice of necessary evidence only "when the Department is aware, or reasonably should be aware, of the existence of such relevant evidence." *McKnight* v. *Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (per curiam).

sure[s] that the claimant's case is presented to the initial decisionmaker with whatever support is available, and … ensure[s] that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant." *Mayfield*, 444 F.3d at 1333; *see also Kent* v. *Nicholson*, 20 Vet. App. 1, 9 (2006) (notice provisions protect the right of claimants to have "a meaningful opportunity to participate in the adjudication of [their] claims").[9]

Significantly, notice failures have ramifications for the entire claims process. If the VA does not inform claimants of the necessary evidence at the beginning of the process, claimants may fail to obtain supporting lay statements, schedule additional medical examinations, or identify relevant records for the VA to obtain. Not only does a notice failure impede the veteran in doing his part to advance his claim, but it also likely renders meaningless much of the other assistance available from the VA. The notice alerts the veteran to the evidence and information needed, what part the VA will be providing, and what the veteran must seek out. Among other things, the veteran can seek the VA's assistance in obtaining required medical evaluations. *See* S. Rep. No. 106-397, at 23 (2000) ("While it is the VA's duty to obtain information and evidence, the Committee expects that claimants *who are made aware of what*

[9] Accordingly, the VA itself has recognized that Congress intended notice to "ensur[e] proper development of the record the first time a claimant submits an application for benefits." VA General Counsel Memorandum 8-2003 ¶ 2 (Dec. 22, 2003); *see also id.* (noting that "the VCAA was drafted so as to impose on VA the duty to notify early in the claim process" because "the drafters wanted claimants to know early in the claim process what was necessary to substantiate their claims").

is needed—or what cannot be found—will cooperate with VA to locate and obtain the required evidence if they are able to do so." (emphasis added)).

More specifically, much of the assistance that Congress requires of the VA hinges on effective notice. The VCAA imposes on the VA a duty to make reasonable efforts to assist claimants in obtaining necessary evidence. 38 U.S.C. § 5103A(a)(1). As part of this duty to assist, the VA is required to "make reasonable efforts to obtain relevant records (including private records) that the claimant adequately identifies to the Secretary." *Id.* § 5103A(b)(1). And for claimants seeking disability compensation, the VA is required to "provid[e] a medical examination … when … necessary." *Id.* § 5103A(d)(1). If the veteran does not receive notice of what evidence is necessary, or which evidence the veteran is responsible for, the veteran is unlikely to be able to make use of these other forms of assistance. The veteran, for example, is less likely to identify the documents for the VA, triggering the VA's obligation to try to obtain the records. The failure of the VA to provide the requisite notice thus not only severely hinders the veteran's ability to obtain benefits, but, by eliminating the linchpin of the assistance provided, it also allows the VA to avoid some of its other statutory obligations.

In fact, Congress's deliberate efforts to cultivate a pro-claimant system compound the effects of insufficient notice. Congress has sought to establish a trusting relationship between the veteran and VA. "[R]eliance on, and faith in what Congress clearly intended to be a paternalistic means for addressing veterans' claims, … [can] lull[] [a claimant] into accepting and relying upon the advice and aid of the government." *Bailey*, 160 F.3d at 1365. Insufficient notice is

all the more problematic because the system fosters the veteran's reliance. The negative impact of VCAA notice failures is exacerbated by the fact that many claimants are unrepresented by counsel when they file a claim because they are statutorily prohibited from paying an attorney in connection with the initial proceedings before the agency. *See* 38 U.S.C. § 5904(c)(1).

Although all of the statutory notice provisions are central to the process, the problems with and consequences of defective notice are most readily apparent for first-element notice errors. First-element notice is the most fundamental, requiring the VA to inform the veteran of "evidence … that is necessary to substantiate the claim." 38 U.S.C. § 5103(a); *see also Mayfield*, 444 F.3d at 1335 n.3 (describing first-element notice as the "core requirement" of VCAA notice). The substantive impact of first-element notice error is severe, as it renders it unlikely that the claimant will provide such evidence or ensure that the agency obtains it; as a result, his claim is likely to be denied.[10] Thus, as the Veterans Court observed, a first-element notice error "preclud[es] [a claimant] from participating effectively in the processing of [the] claim, which would substantially defeat the very purpose of section 5103(a) notice." *Mayfield*, 19 Vet. App. at 122. The impact of a notice error is most troubling where the notice is not simply incomplete, but incorrect, such as when it incorrectly states the evidence necessary to support a claim. Be-

[10] *See Paralyzed Veterans of Am.* v. *Secretary of Veterans Affairs*, 345 F.3d 1334, 1345-1346 (Fed. Cir. 2003) (noting that the VCAA notice provisions "apply *only* when a claim cannot be granted in the absence of additional necessary information described in the notice" (emphasis in original)).

cause of the nature of the system and the veterans' unique relationship with the VA, the claimant can be misled into believing what the notice says and as a result may fail to provide the evidence actually needed to substantiate the claim.

The Government asserts that the pro-claimant nature of the benefits system is irrelevant because a proceeding in the Veterans Court "follows the traditional adversarial model of appellate litigation." Pet. Br. 24. Yet Congress built pro-veteran protections into the judicial review scheme as well.[11] And, in any event, the Government's logic fails: the error at issue occurred in the proceedings before the agency, which were not only non-adversarial, but which would be effectively thwarted by the Government's proposed burden allocation. Where a notice error is at issue, the case has likely left the non-adversarial context because of the VA's failure to comply with its notice obligations. The Government cannot use the VA's own failure to live up to its statutory obligations in the non-adversarial context as a reason to impose duties on the veteran.

Finally, the Government's effort to place the burden on the veteran runs counter to Congress's recent efforts. Congress's reaction to *Morton*—namely, the VCAA—reinforces its intent to burden the agency for the benefit of the veteran. In this case, the Government is attempting to resurrect the type of approach

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[11] *See* 38 U.S.C. § 7261(a)(4) (factual findings of the Board that are favorable to the claimant may not be overturned); *id.* §§ 7261(b)(1), 5107(b) (Veterans Court must "take due account" of the fact that the VA was required to give the "benefit of the doubt" to the veteran, breaking certain evidentiary ties in the veteran's favor).

that Congress rejected when it enacted the VCAA. Specifically, by assigning the burden of prejudice to the veteran, the Government essentially seeks to excuse the VA's noncompliance with its notice requirements except where the veteran shows that the notice would make a difference. But in overturning *Morton* with the VCAA, Congress already determined that the VA cannot fail to assist all veterans even if it perceives such assistance to be unnecessary based on the veteran's failure to show the merit of his claims. Especially given that the notice requirements at issue here are part of the very same statute that overturned *Morton*, the Court should be wary of efforts to lighten the VA's load and force the veteran to demonstrate the merit of his claims before receiving the assistance from the VA to which he is entitled by statute.

C. The Likelihood Of Prejudice From Notice Errors And The VA's Superior Ability To Meet Its Burden Support Allocating The Burden To The VA

Concerns about frustrating congressional purpose, in turn, indicate that a notice error is likely to result in prejudice to the veteran, a factor counseling in favor of allocating the burden to the VA. Moreover, the related question—which party can better bear the burden—confirms this result because, as the nature of the benefits system suggests, the VA is better equipped than the veteran to meet its burden under the prejudicial error rule.

1. The question of probability—whether the error is likely to create prejudice—is relevant to the burden inquiry. *See, e.g.*, *International Bhd. of Teamsters*, 431 U.S. at 359 n.45 ("[p]resumptions shifting the burden of proof are often created to reflect judicial evaluations of probabilities"); 21B Wright & Graham, *Federal Prac-*

tice & Procedure § 5122, at 403 (2d ed. 2005) (courts normally "place the burdens of proof on the party asserting the least probable fact or set of facts"). In this case, the probabilities go hand in hand with the structural and congressional intent questions discussed above.

VCAA notice, required at the very beginning of the process, ensures that the veteran is aware of what evidence and information is needed to support the claim for benefits and, in turn, how to pursue his claim. It also enables the veteran to make use of other VA assistance because, for instance, it puts the veteran on notice of what evidence the VA could help to obtain. Without sufficient notice—particularly first-element notice—the veteran is left in the dark as to what he needs to do to make his claim successful and how to go about doing so. And, because the veterans benefits system encourages reliance on the VA, these notice errors are all the more likely to be problematic, particularly because the veteran is unlikely to be represented by counsel. *See also supra* Part I.B. For all of the reasons that notice errors impede Congress's objectives, they also are likely to lead to prejudice.

Indeed, both the Veterans Court and the Federal Circuit have recognized that the central role of notice means that a notice error is likely to prejudice the veteran. The Veterans Court, which in other contexts places the burden on the veteran,[12] made an exception

[12] *See Moore* v. *Nicholson*, 21 Vet. App. 211, 214 (2007) ("In general, the appellant bears the burden of persuading the Court that the Board decision below is tainted by a prejudicial error that warrants reversing or remanding the matter for the investment of the additional time and effort that would be required by VA to produce a new decision in his case.").

in *Mayfield*, but limited it to first-element notice errors because of their critical role in the process: "The natural effect of such [first-element] error … would constitute a failure to provide a key element of what it takes to substantiate [the] claim, thereby precluding [the claimant] from participating effectively in the processing of [the] claim, which would substantially defeat the very purpose of section 5103(a) notice." *Mayfield*, 19 Vet. App. at 122.[13] The Federal Circuit also allocated the burden to the VA, but did so for all VCAA notice errors. "With respect to first-element notice errors," the court "agree[d] with the Veterans Court that the natural effect of such an error would … 'preclud[e] [the appellant] from participating effectively in the processing of [the] claim,' defeating the very purpose of § 5103(a) notice." Pet. App. 17a (quoting *Mayfield*, 19 Vet. App. at 122 (third alteration in original)). For the Federal Circuit, however, the other notice elements had the same natural effect and thus warranted placing the burden on the VA when it committed those errors as well. *Id.* at 17a-18a.

The Government attempts to argue that notice errors are not likely to produce prejudice (Pet. Br. 31-35), but its arguments are unavailing. It asserts that prejudice should not be presumed because "the VA will likely have taken numerous steps to assist claimants in

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[13] *Mayfield*, 19 Vet. App at 122 ("Accordingly, even though the appellant has failed to assert specifically how she was prejudiced by this asserted notice error, the specificity and substantive nature of her asserted notice error is, as discussed above, such as to make it one that has the natural effect of producing prejudice and thus to shift to the Secretary the burden of demonstrating that there was clearly no prejudice to the appellant based on any failure to give notice as to this element.").

obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case." *Id.* at 34. This argument is problematic for several reasons. First, it turns the statute on its head; if Congress had placed fewer requirements on the VA—had not gone so far out of its way to protect and support the veteran in the claims process—the veteran (according to the Government) would have a better argument for placing the burden on the VA.

Second, it completely ignores the role of notice in ensuring that the other forms of assistance are available and that the veteran is in a position to take advantage of that assistance. Due to the centrality of VCAA notice, access to other assistance is impaired when the VA fails to provide that notice. *See supra* Part I.B (describing, as one example, the duty to locate records under Section 5103A(b), which hinges on the veteran identifying the records, which in turn depends on the veteran receiving notice of the potential relevance of the records).[14]

Third, the Government's argument (Pet. Br. 33-34) relies largely on the VA's obligations that arise *after* the VA has already denied the claim. *See* 38 U.S.C. § 5104(b) (VA must provide statement of reasons for denying a claim); *id.* § 7105(d)(1) (VA must provide

[14] The Government cites 38 C.F.R. § 3.103(c)(1) and (2) for the proposition that the claimant is "entitled to a hearing 'at any time on any issue involved in a claim,' for the purpose of presenting evidence." Pet. Br. 32. Such hearings, however, are only provided "[u]pon request." 38 C.F.R. § 3.103(c)(1). If the veteran is not aware of the evidence needed to substantiate his claim, it is unreasonable to expect that he will request a hearing to present such evidence.

statement of the case following a veteran's notice of disagreement with a denial of claim); *see also Mayfield*, 444 F.3d at 1333 (VA's duty to notify cannot be "satisfied by various post-decisional communications"). And if, in a particular case, the VA has truly "taken numerous steps designed to assist claimants in obtaining necessary evidence and to inform them of any deficiencies in the evidence in a case" (Pet. Br. 34), it will not be difficult for the VA to demonstrate that its VCAA error was harmless. *See infra* Part I.C.2.

2. The proper allocation of the burden is confirmed by the divergent abilities of the VA and veteran to satisfy the burden, given their respective access to the relevant information. *See NLRB* v. *Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (allocation of the burden supported by "practicality" based on the nature of the proof required and the parties' respective abilities to meet the relevant burden); 21B Wright & Graham, *Federal Practice & Procedure* § 5122, at 403-404 ("[C]ourts look to see whether one party has superior access to the evidence needed to prove the fact. If so, then that party must bear the burdens of proof. … [T]he burden should be cast 'on whom it would sit lightest.'").

In cases where there is no prejudice stemming from the VA's failure to comply with its notice obligations, the VA is well-equipped to demonstrate as much. According to Federal Circuit case law, the VA can meet the burden of rebutting a presumption of prejudice once the veteran demonstrates a notice error in several ways, including by showing: "(1) that any defect was cured by actual knowledge on the part of the claimant, (2) that a reasonable person could be expected to understand from the notice provided what was needed, or (3) that a benefit could not have been

awarded as a matter of law." Pet. App. 12a. If the VA has in fact complied with its duties, then it should be able to show that the veteran was not prejudiced. And in many cases, a lack of prejudice will be obvious from the record.[15] A claimant's non-entitlement to benefits as a matter of law also may be clear from the claimant's averments. *See Valiao* v. *Principi*, 17 Vet. App. 229, 232 (2003) ("Where the facts averred by a claimant cannot conceivably result in any disposition of the appeal other than affirmance of the Board decision, the case should not be remanded for development that could not possibly change the outcome of the decision.").

The Government argues that the burden should rest on the veteran because, in its view, the veteran "is more likely to have knowledge of the relevant facts." Pet. Br. 36. But this is by no means clear. For instance, the VA has better access to some facts, such as certain records, which would be further supplemented by specific knowledge it gained when assisting the veteran.

Indeed, the veteran faces obstacles to demonstrating prejudice. As the Government suggests, if the burden to show prejudice were placed on the veteran,

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[15] *See, e.g.*, *Holmes* v. *Peake*, No. 06-0852, 2008 WL 974728, at *2 (Vet. App. Apr. 3, 2008) (claimant "demonstrated his actual knowledge of what was required to substantiate a higher disability rating when he specifically argued that he was entitled to a 30% disability rating and attached a copy of the pertinent rating schedule"); *Clark* v. *Peake*, No. 05-2422, 2008 WL 852588, at *4 (Vet. App. Mar. 24, 2008) ("appellant, throughout the pendency of his claim, has made submissions showing that he had actual knowledge of the need to submit evidence showing the effect that the worsening or increase of his foot condition had on his employment and daily life").

claimants might be required to show "what additional evidence they might have submitted" had proper notice been given. Pet. Br. 36.[16] But Congress has specifically tasked the VA with assisting the claimant in determining what additional evidence he should submit to substantiate a claim, and with helping to find that evidence. *See* 38 U.S.C. §§ 5103(a), 5103A. If Congress thought that it would be easy for the veteran to identify and find the additional evidence needed to substantiate a claim, such statutorily-mandated assistance would be unnecessary. And, in fact, this demonstrates just how contorted the Government's rule would be: after the VA has failed to comply with its obligations to inform the veteran of the necessary evidence, the veteran would be obligated to reveal to the court the same evidence he did not obtain with the VA's notice and assistance. *See Cordova* v. *Peake*, No. 06-0309, 2008 WL 834006, at *3 (Vet. App. Mar. 24, 2008) ("[T]he Board denied [the claimant] an increased rating, in part, due to the lack of … specific evidence that [the claimant] was not notified that he could submit to substantiate his claim.").

The unique circumstances of veterans benefits claimants also make it unlikely that Congress would have wanted to place the burden to show prejudice on the claimant. Veterans are ordinarily unrepresented at

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[16] *Cf. Hunt* v. *Nicholson*, No. 05-2812, 2007 WL 1659062, at *3 (Vet. App. May 11, 2007) (in a pre-*Sanders* case, noting that "[w]hen the appellant alleges second- or third-element error, '[p]rejudice can only arise … if an appellant demonstrates that he or she failed to submit evidence as a result of not being advised to do so, or that the Secretary failed to obtain evidence that he should have obtained'" (quoting *Overton* v. *Nicholson*, 20 Vet. App. 427, 436-437 (2006))).

the time of filing in the Veterans Court, and a fifth remain unrepresented at the conclusion of proceedings.[17] Many veterans, moreover, suffer from debilitating mental and physical health problems[18] that would likely hamper their ability to prove prejudice.

D. The Government's Policy Arguments Do Not Override The Statutory Structure And Purpose

The Government has raised two policy arguments relating to the functioning of the veterans benefits system in support of its conclusion that the burden should be allocated to the veteran rather than the VA. Neither is persuasive.

The Government cites concerns about the effects on the claims system of allocating prejudice to the VA

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[17] In 2007, 53% of the claimants were unrepresented at the time of filing and 19% were unrepresented at the close of proceedings. United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited Oct. 14, 2008).

[18] *See* 146 Cong. Rec. at H6789 (noting effect of "poor health" on ability to obtain evidence); *see also* Alvarez, *War Veterans' Concussions Are Often Overlooked*, N.Y. Times, Aug. 25, 2008, *available at* http://www.nytimes.com/2008/08/26/us/26tbi.html?_r=2&hp&oref=slogin&oref=slogin ("As many as 300,000, or 20 percent, of combat veterans who regularly worked outside the wire, away from bases, have suffered at least one concussion .... [T]ens of thousands ... have longer-term problems that can include, to varying degrees, persistent memory loss, headaches, mood swings, dizziness, hearing problems and light sensitivity."); Cohen, *Talking Veterans Down from Despair*, N.Y. Times, Apr. 22, 2008, *available at* http://www.nytimes.com/2008/04/22/us/22suicide.html?scp=10&sq=veterans&st=cse ("roughly one in five veterans of Iraq and Afghanistan has symptoms of post-traumatic stress disorder").

rather than the veteran. It asserts that the Veterans Court should not presume prejudice in VCAA notice error cases because "such a presumption would generate a large number of remands." Pet. Br. 36. In support of this argument, the Government states that it receives more than 800,000 benefits claims per year. *Id.* at 36-37.

This policy argument fails for several reasons. First, this figure vastly overstates the possible effects of allocating the burden in the prejudice inquiry to the VA. In 2007, the Veterans Court received 4,644 appeals, and it remanded (in full or in part) only 2,045 cases.[19] Those remands already included remands relating to presumed prejudice from first-element notice errors, because that has been the rule since 2005. Accordingly, to hold that the burden rests on the VA for first-element notice errors would have no effect at all. Any additional burden on the VA from a presumption of prejudice for all notice errors would constitute only the incremental remands from second- and third-element notice errors. There is nothing to suggest that presuming prejudice would add substantially to the number of remands. As noted, the Government has ample means to demonstrate the absence of prejudice. Second, the Government can avoid any additional burdens on the system simply by complying with its obligations to provide notice in the first place. Third, policy arguments seeking to streamline the benefits system and unburden the VA should be viewed with skepticism; as discussed *supra* Part I.B, in the VCAA, Con-

[19] *See* United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.uscourts.gov/documents/Annual_Reports_2007.pdf (last visited Oct. 14, 2008).

gress rejected similar efforts reflected in the *Morton* case, making clear that such interests do not trump Congress's efforts to assist the veteran.

The Government has also previously sought to support its reading—which would give the VA more flexibility to avoid its notice obligations—by arguing that the notice requirements are difficult for the VA to satisfy. Pet. 23. Any challenge the VA faces in meeting its statutory obligations is neither here nor there for purposes of allocating the burden in a prejudicial error inquiry where the VA has not complied with these obligations. Any argument to allocate the burden based on the challenges posed in complying with the notice requirements effectively seeks to relieve the VA of its statutory obligations. *See Sugar Cane Growers Coop. of Fla.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002) ("[T]he government would have us virtually repeal section 553's requirements: if the government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—section 553 obviously would be eviscerated.").

* * *

The fundamental role of notice in effectuating Congress's goals for the benefits process, coupled with practical considerations regarding the likelihood of error and the relative challenges of meeting the burden, all counsel heavily in favor of allocating the burden to the VA rather than the veteran for VCAA notice errors. The ambiguous statutory language plainly leaves room for this allocation, and the statutory context—a benefits scheme in which Congress repeatedly has burdened the VA for the benefit of the veteran—only con-

firms the propriety and the consistency with congressional intent of requiring the VA to demonstrate the lack of prejudice.[20] An additional tool of statutory interpretation removes any doubt regarding the proper allocation of the burden in the context of notice errors: Under the "well-established rule of statutory construction …[,] when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" *National Org. of Veterans' Advocates, Inc.* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)); *see also, e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").[21]

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[20] In an analogous context, involving an administrative challenge brought by Native Americans who, like veterans, receive exceptional treatment under the law because of the government's special obligations to them, *see Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976), the Tenth Circuit declined to allocate the burden as to prejudice to the party challenging agency action. In *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982), in which a tribe sued the Interior Department and other defendants for failing to comply with notice regulations when advertising oil leases on the tribe's reservation, the Tenth Circuit concluded that the party defending agency error had the burden to disprove prejudice. The tribe was appropriately relieved of the burden given its inferior access to relevant information and "the underlying policy of protection of the interests of the Indians for whose benefit the regulation was adopted." *Id.* at 1336-1337.

[21] The Government asserts—without citation to authority—that the pro-veteran canon of statutory construction does not apply because the prejudicial error rule is "a procedural rule," rather than a "substantive 'provision[] for benefits.'" Pet. Br. 23. Yet the pro-veteran canon has not been limited to substantive provisions for benefits, but rather has been explicitly applied to notice provi-

II. THE GOVERNMENT IS INCORRECT THAT THE APA REQUIRES THE VETERAN TO BEAR THE BURDEN OF PROVING PREJUDICE UNDER THE VJRA

The Government's brief—largely ignoring statutory context and structure—centers on the incorrect propositions that the APA's prejudicial error rule has an established meaning that would allocate the burden to the claimant, and that the APA and the VJRA must be interpreted consistently. The Government's core argument is that in the 1988 VJRA Congress ratified a uniform understanding of the APA. Yet there was no such settled and uniform view for Congress to ratify. And the Government's more general argument that the APA's meaning should be applied to the VJRA misses several steps. First, it is unclear—given the different contexts—that the APA and VJRA should be interpreted to have the same meaning. And second, contrary to the Government's apparent assumption, the APA does not have a clear rule requiring allocation of the burden to the claimant.

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sions as well as other "procedural" provisions. *See McKnight*, 131 F.3d at 1485 (construing the pre-VCAA notice provision); *McGee* v. *Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) (finding the canon relevant to an interpretation of 38 U.S.C. § 7104(a), which requires the Board to consider "applicable provisions of law"); *see also Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (applying the pro-veteran canon to interpret a Soldiers' and Sailors' Civil Relief Act provision granting a stay of court proceedings against a serviceman unless the ability to conduct a defense was not "materially affected" by service). Moreover, judicial review provisions such as the rule of prejudicial error are part of a broader legislative scheme whose goal is to ensure that veterans receive the benefits to which they are entitled. *See* S. Rep. No. 100-418, at 29 (1988) ("The basic purpose of [the bill adding judicial review] is to ensure that veterans and other claimants before the VA receive all benefits to which they are entitled.").

A. The VJRA Did Not Ratify A Uniform Interpretation Of The APA In 1988 Because There Was No Such Uniform Interpretation

The Government argues that, by the time the VJRA was enacted in 1988, an APA burden regime that invariably placed the burden on the party claiming error had become "entrenched" in the courts of appeals, and that Congress implicitly adopted that rule in the VJRA. Pet. Br. 9, 16. Yet there was no such uniform view: the scattered court of appeals decisions cited by the Government had more limited holdings and, in fact, other courts of appeals had relieved the party claiming error from the burden of establishing prejudice.

As an initial matter, ratification is only one tool of statutory interpretation, and must be considered along with other such tools. *See* 2B Singer & Singer, *Statutes and Statutory Construction* § 49:4, at 24 (7th ed. 2008) ("Contemporaneous and practical interpretation is just another aid to statutory construction, and must be weighed against other factors pertinent to the determination of legislative intent."). Any ratification argument must, at a minimum, be weighed against the statutory purpose and context; the Government is therefore plainly incorrect to suggest that its ratification argument, standing alone, "suffices to resolve this case." Pet. Br. 9.

But even on its own terms, the Government's ratification argument fails, as there was no uniform interpretation of the APA's rule of prejudicial error at the time that Congress passed the VJRA. Nine months before the VJRA was enacted, the D.C. Circuit held that it was "normally inappropriate" to impose the burden of proving prejudice on the party challenging agency action "where the agency has completely failed to comply with [5 U.S.C.] § 553." *McLouth Steel Prods.*

Corp. v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *see also Braniff Airways, Inc.* v. *CAB*, 379 F.2d 453, 465 (D.C. Cir. 1967) ("Reversal is not required by the fact that an agency made an 'error' if it is shown that the error was not 'prejudicial.'"). Other courts of appeals had similarly relieved the party claiming error from establishing prejudice in certain contexts. *See U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979) (refusing to "assume that there was no prejudice to petitioners" and stating that "[a]bsence of such prejudice must be clear for harmless error to be applicable"); *see also Jicarilla Apache Tribe*, 687 F.2d at 1335-1336 (placing burden on party defending agency error in suit brought by Native Americans).[22]

To support its ratification argument, the Government merely cites four pre-1988 cases (and uses a "cf." signal for two of the four). Pet. Br. 15. And even the four pre-1988 cases cited by the Government do not hold that the burden is always placed on the party claiming error, regardless of the type of error at issue. In two of the cases, the court did not purport to articulate a general rule; one of those cases involved a technical error, and, in the other, the court did not determine whether there was error at all. *See City of Frankfort* v. *FERC*, 678 F.2d 699, 708 (7th Cir. 1982) (involving an "alleged technical deficiency" in the agency's use of the

[22] The Government claims that *Jicarilla* "did not interpret the APA at all." Pet. Br. 15 n.4. Yet it is clear that the case presented a challenge under the APA; it is also clear that the agency erred, that the parties defending the error relied on Section 706, and that the court cited Section 706. *See Jicarilla*, 687 F.2d at 1332, 1333 n.5, 1335. Although the language of the case is ambiguous, it is properly read as holding that Section 706 does not require excusal of substantial errors. *See id.* at 1336.

word "affirm" rather than "adopt"); *Beef Nebraska, Inc.* v. *United States*, 807 F.2d 712, 714 n.1 (8th Cir. 1986) (stating that "[e]ven if" there was error the petitioner had failed to show prejudice). The third case, *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981 (9th Cir. 1967), derived its burden rule from *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); but, as this Court has held, *Palmer* places the burden on the petitioner only for certain types of errors. *See also infra* Part II.B.2 (discussing *Seine* and *Palmer*). The final pre-1988 case involved allegations of agency delay, not error in the typical sense. *See City of Camden* v. *Department of Labor*, 831 F.2d 449, 451 (3d Cir. 1987) (citing cases in the specific context of agency delay); *see also Dixon* v. *United States*, 548 U.S. 1, 14 (2006) (rejecting petitioner's attempt to rely on a court of appeals case because "[p]roperly understood" the case did not stand for the proposition urged).

These few cases with limited holdings do not support the Government's contention that a uniform, sweeping rule regarding the burden of proof existed in 1988, especially given that other courts of appeals had at times relieved the party claiming error from demonstrating prejudice. *Cf. Bragdon* v. *Abbott*, 524 U.S. 624, 644 (1998) (ratification where "[e]very court which addressed the issue" had reached the same conclusion); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 380 (1982) (ratification where judicial interpretations were "uniform and well understood").

The Government's efforts to supplement its ratification argument by relying on the definite article "the" used to refer to the prejudicial error rule and scant legislative history are unavailing. By reference to "the prejudicial error rule," the statute is simply referencing the legal concept of harmless error. Contrary to the

Government's suggestion (Pet. Br. 12), the "the" does not require any more—and plainly does not require any particular burden scheme where the statutory language of both statutes does not address burdens and there is no accepted rule as to burden allocation. For similar reasons, the Government's reliance on a VJRA Senate Committee Report that quotes a few sentences from the Ninth Circuit's decision in *Seine*, 374 F.2d 974, is misplaced. The Government concludes from the Report's citation of *Seine* that the Committee interpreted the prejudicial error rule to allocate the burden of demonstrating prejudice to the side asserting error. Pet. Br. 16. The Senate Report, however, merely quotes *Seine*'s general statement that "administrative order[s] should be enforced notwithstanding" "errors [that] are deemed to be minor and insubstantial," but makes no reference to *Seine*'s allocation of the burden in that case. *See* S. Rep. No. 100-418, at 61 (quoting *Seine*, 374 F.2d at 981). This is an insufficient basis for inferring that Congress contemplated a particular burden allocation for all errors. *See Thomas* v. *Arn*, 474 U.S. 140, 150 n.9 (1985) (refusing to find congressional intent to adopt statement from Ninth Circuit case quoted in House Report because Congress cited the case for one proposition, "and not for any other proposition" in the case).

B. The Government's Argument That The VJRA Prejudicial Error Rule Should Be Interpreted Identically To The APA Rule Relies On Two Faulty Assumptions

Although the Government focuses on a ratification argument, it implies throughout its brief that the burden under the APA rule of prejudicial error is clear,

and that the meaning under the APA should decide the meaning of the VJRA rule in this case.[23] This argument fails in light of the differences in the statutory contexts and flaws in the Government's assumption as to the meaning of the APA rule.

1. In light of the differences in the statutory schemes, the interpretation of the VJRA and APA prejudicial error rules need not be the same

As detailed above, *supra* Part I, statutory context is critical to the allocation of burdens. Here, the statutes pertain to two manifestly different regimes, which justifies divergent treatment of the prejudicial error rule language.

Congress specifically designed the veterans benefits regime—and judicial review of that regime—to differ from other administrative schemes. When Congress first provided for judicial review of veterans benefits claims in 1988, it could have brought this review under the APA simply by repealing a statute precluding judicial review of such decisions,[24] or by di-

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[23] *See, e.g.*, Pet. Br. 8 (burden allocation under Section 706 is "settled"); *id.* at 9 (burden allocation under Section 706 is "well-established"); *id.* at 11 (burden allocation under Section 706 has "settled construction"); *id.* at 12 ("[l]inguistic consistency" requires placement of burden on veteran because that is what Section 706 requires); *id.* at 13 ("parallel statutory text … leads to the conclusion that Section 7261(b)(2) unambiguously forecloses the interpretation reached by the Federal Circuit"); *id.* at 14 (Federal Circuit departed from "established APA rule"); *id.* at 23 (meaning of Section 7261 is "not ambiguous" because of the "well-settled meaning of the language in the APA").

[24] *See* 38 U.S.C. § 211(a) (1988); 5 U.S.C. § 701(a).

rectly cross-referencing the APA.[25] Instead, Congress chose to establish a different, separate judicial review system.[26] While Congress apparently sought to borrow certain concepts from the APA, such as the prejudicial error rule, *see* S. Rep. No. 100-418, at 60-61, there is no reason to believe that Congress wanted any particular burden scheme to be imported into this very different statutory context. *See supra* Part II.A.

Nor does the similarity of the language require that the burden be allocated in the same way in these different contexts. The statutory language does not address burdens, and, as this Court has held, the same language may have different meanings in different statutes, depending on context. *See District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973); *see also General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596-597 (2004) ("[s]tatutory language must be read in context"; declining to hold that the word "age" had the same meaning throughout a statute (internal quotations omitted)). For all the reasons outlined in Part I above, the context of the veterans claims system calls for the allocation of the burden to the VA when the agency fails to provide VCAA notice.

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[25] *See, e.g.*, 38 U.S.C. § 501(d).

[26] *See* S. Rep. No. 100-418, at 37 (explaining Congress's decision to create a separate statutory structure for VA review rather than repealing Section 211(a)); *id.* at 59 ("judicial review of VA decision[s] presents a unique situation in several respects" and "a central theme in drafting [the] legislation [was] to preserve those unique and desirable aspects [of the VA system] as much as possible while enhancing them by the addition of a right of judicial review").

The Government asserts that consistent interpretation is required because the APA was meant "to bring uniformity to a field full of variation and diversity." Pet. Br. 14 (quoting *Dickinson* v. *Zurko*, 527 U.S. 150, 154 (1999)). But any desire for uniformity within the APA plainly cannot require extending APA principles to statutory schemes where Congress specifically decided *not* to apply the APA.

2. The Government incorrectly assumes the meaning of the APA provision

Even if there were a need for a consistent interpretation of the VJRA and the APA, the Government simply assumes the meaning of the APA provision. In the 60 years since the enactment of the APA, however, this Court has never confronted the question of which party bears the burden of proof under the APA rule of prejudicial error. Just last Term, for example, in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 127 S. Ct. 2518, 2530 (2007), the Court cited the APA rule of prejudicial error in finding the error at issue harmless, but did not address which party was required to prove or disprove prejudice. Furthermore, as a matter of statutory interpretation, the proper burden assignment under the APA rule of prejudicial error is far from clear.

The APA rule of prejudicial error states that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. The statute does not define the provision, though the statutory reference to "the rule" suggests that Congress was referring to a pre-existing concept. *Cf.* Pet. Br. 12 (arguing that Congress's use of the word "the" in the VJRA shows its "refer[ence] to a particular existing rule that was established and defined at the time the statute was enacted"). The Attor-

ney General's Manual on the Administrative Procedure Act[27] stated that the APA's prejudicial error rule "sums up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies, namely, that errors which have no substantial bearing on the ultimate rights of the parties will be disregarded." *Attorney General's Manual on the Administrative Procedure Act* 110 (1947).[28] At the time the APA was enacted, harmless error in the federal system was governed by a harmless error statute, 28 U.S.C. § 391, which Congress had passed in 1919.[29] This harmless error statute varied the allocation of the burden depending on the type of error at issue.[30]

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[27] This Court has looked to the Attorney General's Manual for guidance when interpreting the APA. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Res. Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

[28] *See also Administrative Procedure Act Legislative History*, Sen. Doc. 79-248, at 415 (1946) (Congress drafted the APA's judicial review provisions to restate existing law "as expounded in various statutes and as interpreted by the Supreme Court" (reprinting remarks of Rep. Hobbs, in turn reprinting a Department of Justice memorandum)).

[29] That statute provided that "in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." 40 Stat. 1181.

[30] In the case of technical errors, the 1919 statute "cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have affected his substantial rights." H.R. Rep. No. 65-913, at 1 (1919). By contrast, for nontechnical errors, i.e., any "error … of such a character that its natural effect is to prejudice a litigant's substantial rights," the

In *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), this Court applied the harmless error statute to a technical error in a civil case.[31] The Court explained that "[m]ere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court." *Id.* at 116 (quoting 28 U.S.C. § 391). For such technical errors, the party "who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Id.* This Court later made clear that the language in *Palmer* placing the burden on the party asserting error, "in context, referred to what the preceding sentence in *Palmer* described as '[m]ere "technical errors.'" " *O'Neal* v. *McAninch*, 513 U.S. 432, 439 (1995) (alteration in original).

Three years later, in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), the Court again confirmed that technical errors "are to be disregarded" unless "the party seeking a new trial [meets] the burden of showing that any technical errors that he may complain of have affected his substantial rights." *Id.* at 760 (quoting H.R. Rep. No. 65-913, at 1 (1919)). The Court made special effort to note, however, "that this burden does not extend to all errors." *Id.* For an error "of such a character that its natural effect is to prejudice a liti-

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burden would remain on the party who sought to defend the verdict. *Id.*

[31] The error at issue was a ruling that a witness statement given to the respondent's attorney would be placed in evidence if the petitioners' attorney reviewed it. *Palmer*, 318 U.S. at 116. The petitioners' attorney chose not to review the statement, objected, and later contended that the ruling was reversible error. *Id.*

gant's substantial rights," the burden of proving harmlessness rests on the party seeking to excuse the error. *Id.* (quoting H.R. Rep. No. 65-913, at 1). Drawing on legislative history, the Court set out the clear rule that "whether the burden of establishing that the error affected substantial rights or, conversely, the burden of sustaining the verdict shall be imposed, turns on whether the error is 'technical' or is such that 'its natural effect is to prejudice a litigant's substantial rights.' " *Id.* at 765 (quoting H.R. Rep. No. 65-913, at 1).[32]

Thus, despite the fact that the Government assumes that the APA rule invariably places the burden on the party claiming error, that conclusion is hardly free from doubt. The backdrop provided by the 1919 harmless error statute suggests the burden allocation varies depending on the nature of the error.

The Government, ignoring these first principles of statutory interpretation, offers as support for its view of the APA a set of court of appeals decisions (including many post-dating 1988). These opinions, however, are

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[32] The Court also distinguished between technical and substantial error in administrative contexts. *Compare Market St. Ry. Co.* v. *Railroad Comm'n of State of Cal.*, 324 U.S. 548, 562 (1945) ("incidental reference" to evidence outside the record was not cause for reversal on due process grounds "in the absence of any showing of error or prejudice"; "due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties"), *with Simmons* v. *United States*, 348 U.S. 397, 406 (1955) (because the Government's failure to comply with a particular statutory procedure was "not an incidental infringement of technical rights," the party claiming error "need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to claim of the deprivation").

largely devoid of any reasoning regarding which party should properly bear the burden of proving prejudice. And, in any event, these cases do not provide support for the Government's sweeping rule.

Many of the court of appeals decisions cited by the Government—covering five circuits—derive from this Court's decision in *Palmer*. For example, in *Seine*, 374 F.2d at 981, the Ninth Circuit stated that "minor and insubstantial" administrative errors would not require reversal. It then announced its burden rule by directly quoting *Palmer*. *Id.*; *see also id.* at 982 (quoting *Palmer*). As noted, this Court has made clear that the language from *Palmer* quoted by the Ninth Circuit, which places the burden on the party asserting error, "in context, referred to what the preceding sentence in *Palmer* described as '[m]ere "technical errors." '" *O'Neal*, 513 U.S. at 439 (alteration in original).[33] Thus, consistent with *Palmer*, *Seine* can be read as placing the burden of proving prejudice on the challenger only with respect to technical errors.[34] The decisions of four other circuits cited by the Government can also be traced, directly or indirectly, back to *Palmer*.[35]

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[33] *See also id.* at 439-440 ("[I]f the error is not 'technical,' … '[then] the burden of sustaining a verdict will … rest upon the one who claims under it.' " (quoting *Kotteakos*, 328 U.S. at 760)).

[34] For the same reason, if the reference to *Seine* in the VJRA legislative history, S. Rep. No. 100-418, at 61, is read to incorporate the entire case rather than the quoted portion, *but see supra* Part II.A, it should be understood to place the burden on the party claiming error only when technical errors are at issue.

[35] *See Air Canada* v. *Department of Trans.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998) (incorporating burden rule from line of civil cases leading back to *Palmer*); *Campanale & Sons, Inc.* v. *Evans*,

More generally, the cases cited by the Government do not support its effort to demonstrate a settled and uniform rule. In four of the cases cited, the court either found no error or left unanswered whether there was error.[36] In another three, the court did not clearly decide which party has the burden of proof.[37] Other cases involved technical errors[38] or allegations of agency delay (rather than error in the typical sense).[39] And in one case, the Government cites a dissenting opinion, in which the dissenting judge argued that the agency had not erred and only discussed the prejudicial error rule

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311 F.3d 109, 127 (1st Cir. 2002) (Lynch, J., dissenting) (incorporating burden rule from *Air Canada* and line of civil cases leading back to *Palmer*); *see also Friends of Iwo Jima* v. *National Capital Planning Comm'n*, 176 F.3d 768, 774 (4th Cir. 1999) (deriving burden rule from *Air Canada*); *American Airlines, Inc.* v. *Department of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000) (deriving burden rule from *Friends of Iwo Jima*).

[36] *See American Airlines*, 202 F.3d at 797 (finding no error); *Air Canada*, 148 F.3d at 1156 (expressing skepticism over whether agency erred, but finding no prejudice "even if" agency erred); *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993) (plaintiffs failed to establish error, but "[e]ven if" agency erred, plaintiffs failed to establish prejudice); *Beef Nebraska*, 807 F.2d at 714 n.1 ("[e]ven if" agency erred, petitioner failed to show prejudice).

[37] *See Kroger Co.* v. *Regional Airport Auth.*, 286 F.3d 382, 389 (6th Cir. 2002); *Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 396 (Fed. Cir. 1996); *City of Frankfort*, 678 F.2d at 708.

[38] *Friends of Iwo Jima*, 176 F.3d at 774 (party claiming error failed to show that outcome would have differed "had notice been at its meticulous best"); *City of Frankfort*, 678 F.2d at 708 (involving "alleged technical deficiency" in the FERC's use of the word "affirm" rather than "adopt").

[39] *See City of Camden*, 831 F.2d at 451.

because it might "be of assistance on remand." *Campanale & Sons*, 311 F.3d at 126 (Lynch, J., dissenting).

Finally, by contrast to the cases the Government cites, court of appeals cases from the D.C. Circuit, the Fifth Circuit, and the Ninth Circuit relieve the party claiming error from proving prejudice in certain contexts. *See, e.g.*, *Sugar Cane Growers Coop. of Fla.*, 289 F.3d at 96 (noting the court's past use of the standard whereby "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure" and finding that Section 553 "would be eviscerated" and "virtually repeal[ed]" if the agency could skip the APA's notice-and-comment procedures with impunity unless the challenger could show prejudice).[40]

Thus, in addition to failing to provide reasoning to inform this Court's analysis, the cases cited by the Government do not support its contention that there is a clear and settled rule under the APA that should guide the allocation of the burden under the VJRA prejudicial error rule.

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[40] *See also City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (describing application of APA harmless error rule, including placement of burden, as "depending on both the types of action and error at issue"); *Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (in applying APA's harmless error rule, "our precedent dictates that the agency must demonstrate that its error on the controlling regulation was harmless"); *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) (noting that "a showing of actual prejudice is not required under the prejudicial error rule"); *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (failing to find that prejudice was "clearly absent").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 2008